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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 757

HELEN CORINNE SCALES TRICE, Executrix,
Petitioner,

vs.

COMMERCIAL UNION ASSURANCE COMPANY,
LTD., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

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FOREWORD.

Is there such a thing as good and justifiable **false** testimony—"lying" on the witness stand—that may be made the basis of the setting aside of the verdict of a jury which refused to believe the testimony of the witness?

The memorandum of the district court reported in **213 F. Supp. 675, 690-692,** may well become a precedent for such a doctrine if this Court does not rebuke and condemn the decision holding that the jury verdict was against the great weight of the evidence consisting of out-of-court statements of one witness and the corroboration of these statements by a witness who was "seriously discredited by the nature of his own testimony, and by his admitted hostility to Mrs. Trice . . .," the "implication of his testimony in the context of this case," in the opinion of the district judge, being that

> ". . . such lying as he may have been doing was designed to minimize his admission of complicity in arson rather than to assume a criminal accomplice's role which he did not play, and that his hostility to Mrs. Trice brought out partial truth, not fabrication."
>
> **211 F. Supp. 692.**

INDEX

Page

Foreword ..... Prefaced

Grounds on which jurisdiction of court is invoked ... 2

Questions presented 3

Statutes and rule of civil procedure involved 5

Statement of the case 6

Argument 11

Question No. 1 11

Questions Nos. 2 and 3 16

Reasons relied on for granting the writ 28

Prayer 29

Appendix—Opinion of the Court of Appeals 30

Cases Cited.

Continental Casualty Co. v. U. S., 167 F. 2d 107, cer. den. 337 U. S. 940, 69 S. Ct. 1517, 93 L. ed. 1745, reh. den. 338 U. S. 840, 70 S. Ct. 35, 99 L. ed. 514 .. 15

Epperson v. Westchester Fire Ins. Co., 155 Tenn. 621, 299 S. W. 776 23

Hill v. Chicago and Evanston Ry. Co. et al., 140 U. S. 52, 11 S. Ct. 690, 35 L. ed. 331 14

Ins. Co. v. Scales, 101 Tenn. 628 23

Marshall's U. S. Auto Supply, Inc. v. Cashman (C. A. 10th), 111 F. 2d 140, certiorari denied 311 U. S. 667, 61 S. Ct. 26, 95 L. ed. 426 26

National Farmers Union Auto. & Cas. Co. v. Wood, 207 F. 2d 659 (C. A. 10th) 28

Teller v. Athens Stove Works, 7 F. R. D. 88 23
Tenn., etc., Ins. Co. v. Horner, 198 Tenn. 445 23
United States v. Schaefer Brewing Company, 356 U. S. 227, 2 L. ed. 2d 721, 78 S. Ct. 674 12

Statutes Cited.

Rule 69, Tenn. Code Anno. 26-120 13
28 U. S. C. 1254 (1) 3
28 U. S. C. 1291 5
28 U. S. C. 2107 5

Rules Cited.

Federal Rules of Civil Procedure 62 (a) 13
Federal Rules of Civil Procedure 73 5

Textbooks Cited.

Barron and Holtzoff, Fed. Pr. and Proc., Vol. 3A, Sec. 1558 16
5 Moore's Fed. Practice, par. 52.11 (2) 16

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HELEN CORINNE SCALES TRICE, Executrix,
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COMMERCIAL UNION ASSURANCE COMPANY,
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Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

Petitioner, Helen Corinne Scales Trice, Executrix under the Will of Joe W. Scales, Deceased, asks that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit rendered in this case on July 14, 1964. The opinion of that court is reported as **Helen Corinne Scales Trice, Executrix v.**

Commercial Union Assurance Company, Ltd., et al., 334 F. 2d 673. A copy of this opinion is appended hereto.

The district court delivered several opinions, two of which (a Memorandum filed Dec. 20, 1962 and a Supplemental Opinion filed Jan. 25, 1963) are reported under the style and name of **Thurman Smith, Trustee, et al. v. Insurance Company of North America, et al., 213 F. Supp. 675.** Inasmuch as these opinions take up 28 printed pages in the reports and nothing therein contained is pertinent to the first question presented and it would seem that the convenience of the Court on considering the second and third questions presented would be little subserved by a reprinting of these opinions, either as an appendix to this petition or separately, petitioner hopes that the Court will treat this petition as being in compliance with Rule 23 (i). If the Court, however, desires that the opinions in **213 F. Supp.** commencing at page 675 be printed and separately presented, petitioner offers to do so and prays that she be given a few days additional time for filing said printed opinions as a separate appendix to her petition.

GROUNDS ON WHICH JURISDICTION OF COURT IS INVOKED.

(i) The judgment of the Court of Appeals sought to be reviewed was dated July 14, 1964 and entered the same date. The time for filing a petition for writ of certiorari was extended by Associate Justice Potter Stewart to Dec. 14, 1964.

(ii) On petitioner's timely motion for an extension of time to file a petition to rehear, on August 14, 1964 the Court of Appeals extended the time for filing a petition to rehear to August 24, 1964. The petition to rehear was filed and was overruled by the Court of Appeals on September 3, 1964. (The date of the denial of the petition to

rehear is erroneously stated to be September 1, 1964 in the report of the case at **334 F. 2d 673.**)

(iii) The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

1. Was petitioner's appeal No. 15,285 from the portion of the order of the district court entered July 23, 1962 amending the judgment on the jury verdict entered May 25, 1962 by providing

> ". . . but the defendants shall be entitled to credit against this judgment for all sums paid Thurman Smith, individually or as trustee for the Union Bank of Pulaski, Tennessee, on the indebtedness constituting a lien on the property of the plaintiff's testator subject to the mortgage clauses of the defendants' policies"

proper, timely and necessary in order for petitioner to obtain appellate review of this portion of the judgment adverse to her; and was it error for the Court of Appeals to fail and refuse to pass on the questions raised by petitioner asserting:

> a) the lack of power and jurisdiction of the district court to amend the judgment on the jury verdict after the lapse of ten days on grounds not set up by the defendants in their motion for a judgment n. o. v. and alternately for a new trial, and
>
> b) absent any contract provision, statute or rule of law entitling the defendants to have the credit placed on the judgment was the action of the court in so ordering it erroneous **as a matter of law** and a violation of the Seventh Amendment forbidding that

> the fact of the amount of damages sustained by the insured should be otherwise re-examined by the court and judgment rendered for a different amount of damages than found by the jury?

2. Did the Court of Appeals fail to perform its duty of passing on the questions raised by petitioner in her appeal No. 15,345 asserting the lack of power and jurisdiction of the district court to grant a new trial and **errors of law** committed by the district court in applying standards for weighing evidence which were wrong as a matter of law.

3. Did the Court of Appeals err **as a matter of law** in holding that there was no abuse of discretion by the trial court in granting defendants' motion for a new trial because a review of the record revealed that

> "There was substantial evidence in the record to the effect that the insured had been guilty of fraud and false swearing in the proof of loss and that he participated in procuring of the burning of the subject property."

instead of declaring and holding that, since the jury were the exclusive judges of the credibility of the witnesses and the weight of their testimony, they had the right to disbelieve the testimony of the witnesses offered by the defendants and that if affirmatively appeared from the memorandum opinion of the district judge that, although he said that he found upon weighing the evidence that the great weight of the evidence was against the verdict, he based this upon his own views as to the credibility of the witnesses conceding that the plaintiff called rebuttal witnesses to rebut the testimony of R. C. Jones (who the trial judge conceded was seriously impeached on cross-examination) and the "out-of-court statements" of James Nelson who testified on the stand repudiating his "out-

of-court statements", and, therefore, the trial judge exceeded his powers and invaded the province of the jury in setting aside their verdict?

STATUTES AND RULE OF CIVIL PROCEDURE INVOLVED.

Title 28, U. S. C., Sec. 2107, provides:

"**Sec. 2107. Time for appeal to court of appeals.**

Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree."

* * * * * * *

Title 28, U. S. C., Sec. 1291, provides:

"**Sec. 1291. Final decisions of district courts.**

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . ."

* * * * * * *

Federal Rule of Civil Procedure 73 provides:

Appeal to a Court of Appeals.

"**(a) When and How Taken.** When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, . . . The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to

run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules; granting or denying a motion under Rule 52 (b); or granting or denying a motion under Rule 52 (b) to amend or make additional findings of fact whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59."

STATEMENT OF THE CASE.

This lawsuit was brought in the United States District Court for the Middle District of Tennessee, by petitioner's testator, Joe W. Scales, to collect the insurance on a feed mill known as Pulaski Mill & Elevator Company. The mill was damaged by fire on July 14, 1956. Joe W. Scales, the original plaintiff, was the owner of the Pulaski Mill & Elevator Company property and was the named insured in policies issued by seven insurance companies, the defendants-appellees below.

The insurance policies involved in the lawsuit provided a total coverage of $25,000.00 on the buildings and an additional coverage of $25,000.00 on machinery and equipment.

At the time of the fire loss, Thurman Smith and the Union Bank of Pulaski, Tennessee, were the holders of an indebtedness approximating $40,000.00, which was secured by a deed of trust on the mill property, machinery and equipment. These lien-holders joined as original co-plaintiffs in the suit, asserting rights under the standard mortgage clauses in the policies.

The plaintiff, Joe W. Scales, died during the pendency of the suit in the district court. The suit was revived in

the name of Helen Corinne Scales Trice, Executrix, the present petitioner.

Among other defenses, the insurance companies contended that the insured Joe W. Scales was barred from collecting the insurance by fraud, false swearing and wilful misrepresentation in the proof of loss and that he had procured the mill to be burned to collect the insurance and defraud the insurance companies. Each side sought to recover a statutory penalty from the other for bad faith in bringing the suit or in refusing to pay the loss.

The case was tried before a jury. After the completion of the evidence and before the submission to the jury, the defendant insurance companies got the mortgagee-plaintiffs out of the case by paying them $32,962.50, representing a payment of $25,000.00 under the building coverage and the machinery and equipment coverage, and $7,962.50 interest thereon. This settlement was without the approval or consent of petitioner.

The court submitted separate questions or issues to the jury. The jury answered that the decedent-insured did not procure the mill to be burned and was not guilty of fraud, false swearing and misrepresentation in the proof of loss. They returned a verdict in favor of petitioner for $25,000.00, the policy limits on the buildings, and $20,000.00 on the machinery and equipment clauses wherein the policy limits totalled $25,000.00. The claim of the plaintiff for a statutory penalty by reason of bad faith on account of the refusal to pay the loss was denied by the jury.

The above jury verdict was returned May 18, 1962. Judgment was entered upon the verdict on May 25, 1962, the notation on the clerk's docket being as follows:

5-25-62 Judgment hereby entered by oral order of the

> Court from the bench May 18, 1962, upon a special jury verdict in favor of the plaintiff, Helen Corrinne Scales Trice, executrix of the will of Joe W. Scales, deceased, and against the defendants, Commercial Union Assurance Company, Limited; American National Fire Insurance Company; North British and Mercantile Insurance Company, Limited; New Hampshire Fire Insurance Company; Citizens Insurance Company of New Jersey; Queen Insurance Company of America, and the Home Insurance Company, in the sum of $25,000.00 for damages to insured building items and in the sum of $20,000.00 for damages to insured machinery and equipment items. F. E. W., D. C."

On May 28, 1962 a judgment of dismissal of the claims of the mortgagee-plaintiffs in accordance with the settlement agreement before the submission of the case to the jury was entered. On the same date, the seven defendant insurance companies filed a motion for judgment notwithstanding the verdict or in the alternative for a new trial.

On June 4, 1962, plaintiff-petitioner filed a motion to have the judgment amended to include interest from the date the suit was brought. The defendants objected to the allowance of interest and asked the court to enter a judgment which would allocate by specific sums the liability of each defendant according to its proportional coverage and credit the defendants with the amount paid or to be paid to the mortgagees under the settlement agreement, and to tax the costs one-third against the plaintiff and two-thirds against the seven defendants against whom the verdict was rendered.[1]

---

[1] In the same suit petitioner had sued other companies to collect insurance on grain and contents and the jury returned a verdict against her on these policies and assessed a penalty against her for bad faith in bringing the suit. Petitioner paid this judgment.

The defendants asked for such judgment instead of bringing their motions for judgment n. o. v. and alternate motion for a new trial up for hearing and determination by the court.

On July 23, 1962 the following notation was made on the clerk's docket:

7-23-62 *Order entered by Judge Frank Gray, Jr., ordering that the judgment entered May 25, 1962, in favor of the United States Fidelity and Guaranty Company and the Insurance Company of North America be, and it is hereby, approved, and the judgment in favor of Helen Corinne Scales Trice, executrix of the will of Joe W. Scales, deceased, be and it is hereby, amended to read as follows:

"Judgment is hereby entered as of May 25, 1962, that the plaintiff, Helen Corinne Scales Trice, executrix of the will of Joe W. Scales, deceased, have and recover of the defendants, Commercial Union Assurance Company, Limited; American National Fire Insurance Company; North British and Mercantile Insurance Company, Limited; New Hampshire Fire Insurance Company; Citizens Insurance Company of New Jersey; Queen Insurance Company of America, and the Home Insurance Company, the sum of $45,000.00 together with interest thereon from June 19, 1957, in the sum of $13,320.00, making a total sum of $58,320.00, but the defendants shall be entitled to credit against this judgment for all sums paid Thurman Smith, individually or as trustee for the Union Bank of Pulaski, Tennessee, or to the Union Bank of Pulaski, Tennessee, on the indebtedness constituting a lien on the property of the plaintiff's testator subject to the mortgage clauses of the defendants' policies. The costs shall be taxed one-fifth against the plaintiff, Helen Corinne Scales Trice, and four-

> fifths against the above-named defendants." (Attested copy mailed all counsel of record in this action.)

On July 30, 1962, the defendant insurance companies filed a motion pursuant to Rule 59 (e) to amend the judgment entered on July 23, 1962 by disallowing all interest from the time of the filing of the suit to date.[2]

On August 2, 1962, plaintiff-petitioner filed a motion to alter the judgment entered on July 23, 1962 by vacating that portion giving the defendants credit for the sum paid the mortgagees in settlement.

On October 8, 1962, the court entered an order overruling the motions of both the defendants and the plaintiff to amend the judgment entered July 23, 1962.

On November 7, 1962, the thirtieth day after the entry of the order on October 8, 1962, plaintiff (petitioner) filed notice of her appeal from that part of the judgment and order entered July 23, 1962, amending the judgment entered on May 25, 1962 on the jury verdict against the defendants by providing

> ". . . but the defendants shall be entitled to credit against this judgment for all sums paid to Thurman Smith, individually or as trustee for The Union Bank of Pulaski, Tennessee, on the indebtedness constituting a lien on the property of plaintiff's testator subject to the mortgage clauses of the defendants' policies."

---

[2] The motion contained the following paragraph:

"The Defendants herein having previously, on May 28, 1963, filed a motion for a new trial subsequent to the docket entry of the Clerk pursuant to the verdict of the jury, these Defendants not waiving any rights resulting from said filing of said motion but expressly relying thereon to the hearing here and now reaffirm and reiterate said motion previously filed May 28, 1962, and incorporate herein by reference as fully and completely as though the same were copied fully herein."

ARGUMENT.

The judicial function in this case was performed in stages in an unusual way, i. e.:

First, on May 25, 1962, annotation of judgment by oral order of the court from the bench on May 18, 1962 on the jury verdict in favor of the plaintiff against the seven insurance companies for $25,000.00 damages to insured building items and in the sum of $20,000.00 for damages to insured machinery and equipment was made by the clerk of the court.

Secondly, the judgment was amended by order entered on July 23, 1962 allowing interest on plaintiff's timely motion to amend judgment but crediting the total amount of the judgment, $58,320.00, in compliance with the request of the defendant insurance co. nies **without timely motion to amend,** with the amount of sums paid mortgagees and taxing costs; and after plaintiff had appealed from the portion of the order amending the judgment by giving the defendants the credit which they asked for,

Thirdly, by setting aside the jury verdict and the judgment thereon and the granting of a judgment n. o. v. for the defendants against the plaintiff for $6,250.00 for a penalty for bad faith in bringing the suit and, if the judgment n. o. v. should be reversed on appeal, a new trial.

Question No. 1.

Was petitioner's appeal No. 15,285 from the portion of the order of the district court entered July 23, 1962 amending the judgment on the jury verdict entered on May 25, 1962 by providing

> ". . . but the defendants shall be entitled to credit against this judgment for all sums paid Thurman Smith, individually or as trustee for the Union Bank

of Pulaski, Tennessee, on the indebtedness constituting a lien on the property of the plaintiff's testator subject to the mortgage clauses of the defendants' policies"

proper, timely and necessary in order for petitioner to obtain appellate review of this portion of the judgment adverse to her; and was it error for the Court of Appeals to fail and refuse to pass on the questions raised by petitioner asserting:

a) the lack of power and jurisdiction of the district court to amend the judgment on the jury verdict after the lapse of 10 days on grounds not set up by the defendants in their motion for a judgment n. o. v. and alternately for a new trial, and

b) absent any contract provision, statute or rule of law entitling the defendants to have the credit placed on the judgment was the action of the court in so ordering it erroneous **as a matter of law** and a violation of the Seventh Amendment forbidding that the fact of the amount of damages sustained by the insured should be otherwise re-examined by the court and judgment rendered for a different amount of damages than found by the jury?

Points and propositions of law relied on by petitioner.

A. **The judgment entered July 23, 1962 was the final judgment.**

The judgment was for money and, in the language of Mr. Justice Whitaker's opinion in **United States v. Schaefer Brewing Company, 356 U. S. 227, 2 L. ed. 2d 721, 78 S. Ct. 674,** "embodies the essential elements of a judgment for money and clearly evidences the judge's intention that it shall be his final act in the case." Petitioner quotes further from the opinion of the Court in the above case:

"If it does so, it constitutes his final judgment and, under Rule 58, it 'directs that a party recover (a sum of) money,' and 'upon receipt by (the clerk) of the (opinion),' requires him to 'enter judgment forthwith' against the party found liable for the amount awarded, which is to be done by making a brief 'notation of (the) judgment in the civil docket (showing the substance of the judgment of the court) as provided by Rule 79 (a).' When all of these elements clearly appear final judgment has been both pronounced and entered, and the time to appeal starts to run under the provisions of Rule 73 (a). And, as correctly held by the Court of Appeals, the later filing and entry of a more formal judgment could not constitute a second final judgment in the case nor extend the time to appeal. 236 F. 2d at 892."

The judgment in the case at bar was noted on the clerk's docket. No further judicial act was required before the clerk of the court was authorized to issue execution. It was not necessary that the judgment expressly direct execution to issue. **Federal Rule of Civil Procedure 62 (a); also Rule 69, Tenn. Code Anno. 26-120, providing that the clerk shall issue to the plaintiff, his agent or attorney, on demand, an execution on any judgment or decree to which the plaintiff is entitled.**

The ascertainment of the amount of the credit was a ministerial act which could be performed by the clerk, since the agreement between the insurance companies and the mortgagees has filed in the case and noted on the clerk's docket.

The judge in the judgment entered July 23, 1962, made no reservation of the right to pass on the defendants' motion for a judgment n. o. v. and alternately a new trial previously filed. It would be most extraordinary, if he had the intention to consider the motion of the defendants and decide whether to set the jury verdict aside and

award a new trial, for him to decide plaintiff's motion to increase the judgment by adding interest and grant defendants' request that they receive a credit against the judgment before deciding whether the judgment was to stand or not.

In determining whether or not the judgment evidenced an intention to make reservation of the power to pass on the defendants' motion for judgment n. o. v. and alternately for a new trial at a later date, obviously what the judge actually did at a later date is not material.

Clearly the judgment of July 23, 1962 was the final judgment in the case and the time for an appeal from it started running under Rule 73 (a) on the date of its entry unless the statute was tolled by the pendency of defendants' undetermined motion filed prior to its entry. Was the **plaintiff's** statutory time for an appeal from a portion of a judgment adverse to him suspended by a timely motion of the **defendant** made pursuant to the rules as provided by Rule 73 (a)? On principle and authority the answer to that question is "no."

In the case at bar, if the plaintiff had not appealed from the portion of the judgment giving the defendants the credit against the judgment and the defendants had withdrawn their motion after the appeal time had run, plaintiff would unquestionably have lost the right to obtain appellate review of the judgment. Nor has it been settled that petitioner could have appealed from a subsequent order overruling defendants' motion for judgment n. o. v. and for a new trial.[3]

---

[3] Cf. *Hill v. Chicago and Evanston Ry. Co. et al.*, 140 U. S. 52, 11 S. Ct. 690, 35 L. ed. 331, in which this Court declared: "The decree of June 8, 1885, was appealable as to the matters which it fully determined; so also was the decree of July 14, 1887, as to the severable matter which it involved. . . . But the time to appeal from the first decree elapsed; and no question being raised as to the second decree, that of July 14, 1887, it must be affirmed, and it is so ordered."

The only decision squarely in point on the question that petitioner has found is one by the Court of Appeals for the Ninth Circuit holding that where defendants did not join in co-defendant's motions for a new trial and appealed more than three months after the entry of judgments against them but within three months after the denial of motions for new trial, their appeal was too late and must be dismissed. (This case arose before the change of the time for appeal to 30 days.) The Court of Appeals for the Ninth Circuit in **Continental Casualty Co. v. U. S., 167 F. 2d 107, cer. den. 337 U. S. 940, 69 S. Ct. 1517, 93 L. ed. 1745, reh. den. 338 U. S. 840, 70 S. Ct. 35, 99 L. ed. 514,** declared:

> "The Continental Casualty Company and Goerig and Philip moved for a new trial. The three Macris did not join in the motion. The motions for a new trial were denied on May 20, 1947. The Continental Casualty Company and Goerig and Philip appealed within three months after May 1, 1947. The Macris delayed their appeal until August 18, 1947, more than three months after the entry of the judgments against them, but within three months after the denials of the motions for new trial, in which they did not join.
>
> "Schaefer, for whom the United States sues, but not the United States the use plaintiff, moves to dismiss the Macris' appeal on the ground of absence of jurisdiction. There is no motion on behalf of others having judgment. However, since the question is one of jurisdiction, we must proceed to consider it, even though there may be no moving party.
>
> "As to the judgments against the three Macris on their cross complaints, it is apparent their appeal must be dismissed. They made no motion for a new trial as to these judgments, and that of Goerig and Philip was of adversary parties and could not be construed as on behalf of the Macris. So also of the judgment

for the United States on the second count against the Macris alone. The statute was not tolled as to it."

B. The Court of Appeals cited cases for the proposition that an untimely appeal does not divest the trial court of jurisdiction to proceed to final judgment. Thus, the opinion begs the question. For, if the judgment of July 23, 1962 was the final judgment, unquestionably the appeal therefrom by petitioner divested the trial court of jurisdiction to grant the judgment n. o. v. and the alternate new trial. **5 Moore's Fed. Practice, par. 52.11 (2); Barron and Holtzoff, Fed. Pr. and Proc., Vol. 3A, Sec. 1558.** Cases applying the rule are well-nigh numberless.

Therefore, petitioner in case No. 15,286, insisted that the district court, after the appeal taken by her on Nov. 7, 1962 from the final judgment, was without power or jurisdiction to set aside the jury verdict and enter a judgment n. o. v. and grant an alternate new trial.

C. The Court of Appeals said that all issues raised by the appeals in Dockets Nos. 15,285 and 15,286 were likewise asserted in Docket No. 15,345, but considered none of them and even refused to pass on all the issues raised by petitioner in her appeal No. 15,345. Petitioner says that the Court of Appeals did not do its duty to pass on the questions raised in her appeals.

Questions Nos. 2 and 3.

2. Did the Court of Appeals fail to perform its duty of passing on the questions raised by petitioner in her appeal No. 15,345 asserting the lack of power and jurisdiction of the district court to grant a new trial and **errors of law** committed by the district court in applying standards for weighing evidence which were wrong as a matter of law.

3. Did the Court of Appeals err **as a matter of law** in holding that there was no abuse of discretion by the trial

court in granting defendants' motion for a new trial because a review of the record revealed that

> "There was substantial evidence in the record to the effect that the insured had been guilty of fraud and false swearing in the proof of loss and that he participated in procuring of the burning of the subject property."

instead of declaring and holding that, since the jury were the exclusive judges of the credibility of the witnesses and the weight of their testimony, they had the right to disbelieve the testimony of the witnesses offered by the defendants and that it affirmatively appeared from the memorandum opinion of the district judge that, although he said that he found upon weighing the evidence that the great weight of the evidence was against the verdict, he based this upon his own views as to the credibility of the witnesses conceding that the plaintiff called rebuttal witnesses to rebut the testimony of R. C. Jones (who the trial judge conceded was seriously impeached on cross-examination), and the "out-of-court statements" of James Nelson, who testified on the stand repudiating his "out-of-court statements", and, therefore, the trial judge exceeded his powers and invaded the province of the jury in setting aside their verdict.

The applicable rules of law declared by this court and how they were disregarded by district court.

The law.

" . . .; the verdict negatives the notion of fraud. There was conflicting evidence; the weight to be given this was for them to determine."

Soler & Co. v. United Firemen's Ins. Co., 299 U.

Excerpts from memorandum of district court setting aside verdict of jury.

"There was enough conflicting evidence on the arson issue to preclude a directed verdict on that ground . . . (p. 638).

. . . . . .

S. 45, 50, 57 S. Ct. 54, 81 L. ed. 30.

. . . . . .

"The jury are the judges of the credibility of witnesses and of the weight to be given any testimony, and whether it establishes a controverted fact."

Headnote 7, **Aetna Life Ins. Co. of Hartford, Conn. v. Ward, 140 U. S. 76, 11 S. Ct. 720, 35 L. ed. 371.**

. . . . . .

"But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion."

Lavender v. Kurn, 327 U. S. 645, 653, 66 S. Ct. 232, 90 L. ed. 916.

. . . . . .

"This action for damages alleged to have been caused to the petitioner by the respondent's use in violation of the Safety Appliance Acts, of a railroad freight car not equipped with efficient hand brakes, presents the question whether the

". . . the findings also reflect the court's judgment on the credibility of witnesses to some extent . . .

"The jury could not have been so capricious as to believe Nelson's testimony on the stand, and it was precluded from accepting the reading of his prior deposition during his examination as substantive proof. Nelson's testimony, therefore, must be disregarded for present purposes. This does not mean, however, that the uncontradicted evidence of his prior confessions and denials must be disregarded . . . yet the circumstances under which his various out-of-court statements were made provide strong evidence from which to draw inferences as to the probability that he set the fire at Scales' request . . .

. . . . . .

"Considered together, all of Nelson's actions and statements prior to the trial are almost conclusive on reasonable minds that Nel-

evidence at the trial, with inferences that the jury justifiably could draw from it, was sufficient to support the verdict for the petitioner. We hold that it was . . .

"We believe that the evidence given at the trial, with the inferences that the jury justifiably could draw from it, was sufficient to support the verdict originally rendered for the petitioner. Accordingly the judgment of the Circuit Court of Appeals sustaining the judgment entered for the respondent by the District Court is hereby reversed."

Myers v. Reading Company, 331 U. S. 477, 67 S. Ct. 1334, 91 L. ed. 1615.

son took part in setting fire to the mill . . .

. . . . . .

"In rebuttal, the plaintiff offered an impressive array of undependable witnesses.

. . . . . .

"Even if the arson issue had to be decided only on the basis of Jones' testimony in court and Nelson's established out-of-court statements versus plaintiff's rebuttal witnesses, a jury verdict for the defendants would have been fully supported.

The applicable rules of law declared by this Court and how they were disregarded by Court of Appeals.

The law.

". . . where the evidence in a cause conduces to prove a fact in issue before a jury, it is competent in law to establish such a fact; a jury may infer any fact from such evidence which

Excerpts from opinion of Court of Appeals.

"The granting of a new trial upon the ground that the verdict is contrary to the weight of the evidence is a matter resting in the sound discretion of the

the law authorizes a court to infer on a demurrer to the evidence: after a verdict in favor of either party on the evidence, he has a right to demand of a court of error that they look to the evidence only, for only one purpose, and with the single eye to ascertain whether it was competent in law to authorize the jury to find the facts which make out the right of the party, on a part, or the whole of his case . . .

Hepburn v. Dubois, 12 Pet. 345, 9 L. ed. 1111.

. . . . . .

"Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because the judges feel that other results are more reasonable."

Tennant v. Peoria & Union R. Co., 321 U. S. 21, 64 S. Ct. 409, 88 L. ed. 520.

"The conflict in the testimony was resolved by the jury's verdict in favor of the petitioner. Since there Trial Judge and his action thereon is not reviewable upon appeal except upon a showing of a clear abuse of discretion.

. . . . . .

"A review of the record in this case reveals that there was no abuse of discretion by the Trial Court in granting the defendants' motion for a new trial. There was substantial evidence in the record to the effect that the insured had been guilty of fraud and false swearing in the proof of loss and that he had participated in procuring the burning of the subject property.

"Having concluded that the judgment notwithstanding the verdict should be set aside but that the Trial Court did not abuse its discretion in granting a new trial, it is not necessary to consider other issues raised in this appeal. . . ."

was an evidentiary basis for that verdict, it was error for the New York trial and appellate courts to re-evaluate the conflicting evidence and mandate a result opposite from that reached by the jury.

. . . . . .

"Since, in this case, petitioner's evidence, though disputed constituted probative facts sufficient to support the finding of negligence, the state courts improperly invaded the function and province of the jury in setting the verdict aside. Rogers v. Missouri Pacific R. Co., 352 U. S. 500, 1 L. ed. 2d 493, 77 S. Ct. 443."

Basham v. Pennsylvania R. Co., 372 U. S. 699, 83 S. Ct. 965, 10 L. ed. 80, 82.

The questions raised by petitioner which the Court of Appeals refused to pass on.

III.

Did the Lower Court Lack the Power and Jurisdiction to Grant a New Trial on the Issue of Fraud and False Swearing or Abuse Its Discretion by Doing So?

The Lower Court Answered This "No".

Appellant Contends This Should Be Answered "Yes".

For the following reasons, appellant contends that the trial court made reversible error in granting a new trial on the issue of fraud and false swearing:

1. The only specific ground for granting a new trial on this issue set forth in the defendant's motion for an alternative new trial was ground No. 12 complaining of the submission of the issue divided into four parts. The lower court, as appellant reads the Memorandum overruled this ground. Defendants have not appealed and are not in position to obtain review of the decision of the lower court on this ground on appellant's appeal. In any event, the submission was proper.

2. The court's power to grant a new trial on its own initiative ended 10 days after the entry of the judgment on May 25, 1962.

3. Since the theory of fraud based upon the overstatement of the size of the grain bins was not raised during the lifetime of Joe W. Scales—although defendants' adjuster had knowledge of the mistake and since Joe W. Scales on oral examination testified he did not know what grain was in the bins but vouched for the correctness of the proof of loss because of the confidence he had in his bookkeeper, Buford Hill, the defendants are barred by bad faith from attempting to obtain a new trial on the theory that Joe W. Scales misrepresented the size of the grain bins to deceive

the mill insurers lest they might discover, and the grain insurers through them, the "falsity of the claims against their co-defendants."

The **Tennessee Supreme Court in Tenn., etc., Ins Co. v. Horner, 198 Tenn. 445,** held that good faith on the part of an insurer requires that it point out details in which notice and proof of loss is insufficient and give insured opportunity to correct the defects and good faith does not permit the insurer to be silent and evasive under such circumstances. In **Teller v. Athens Stove Works, 7 F. R. D. 88,** the U. S. Dist. Court for the Eastern District of Tennessee, held that a litigant is not entitled to a new trial on the basis of a different theory predicated on the same facts. The theory advanced by the lower court in par. 10 of his memorandum at page 683 was not raised by the defendants but was asserted by the court for the first time when the Memorandum was filed.

4. The court in granting the new trial acted under the compulsion of mistakes of law in that:

a) The above theory of an intent to deceive the mill insurers amounts to building an inference upon another inference which may not be done.

b) The forfeiture clause of the policies, under the rule of strict construction required in Tennessee **(Ins. Co. v. Scales, 101 Tenn. 628),** related to the insured property only, and hence any representation or statement as to the value of other property not covered by the policies was immaterial. On the facts of this case, **Epperson v. Westchester Fire Ins. Co., 155 Tenn. 621, 299 S. W. 776,** furnished the rule of decision, and the court misinterpreted that case.

c) The court had no right to look to the jury verdict on the grain claims "to give color and meaning to the vast overstatement of the grain dimensions," since the jury

under instructions which were not excepted to by the defendants, necessarily found that the overstatement did not affect the policies of the companies insuring the mill so as to amount to fraud.

IV.

Was It Reversible Error for the Trial Court to Grant the Defendants' Alternative Motion for a New Trial on the Arson Issue?

The Lower Court Answered This "No".

Appellant Contends This Should Be Answered "Yes".

For the following reasons, appellant contends that the trial court made reversible error in granting the defendants' alternative motion for a new trial on the arson issue:

1. The defendants' motion filed within 10 days from the entry of the judgment conferred no authority upon the court to grant the motion because it failed to comply with Federal Rule of Civil Procedure 7 (b) in that it did not state with sufficient particularity any grounds therefor.

2. The court lacked the power to grant a new trial on its own initiative because this power ended 10 days after the entry of the judgment.

3. It affirmatively appears from the court's Memorandum that the new trial was granted solely because the court thought a different inference from conflicting evidence was more reasonable than the one the jury drew.

4. In finding a motive for arson on the part of Joe W. Scales the court inadvertently drew a conclusion wholly unwarranted and improper since it is contrary to reason and common sense said conclusion being expressed in these words:

> "2. Scales obtained title to this mill in a transaction with Lewis E. Hewgley for a consideration that was

the subject of rather evasive testimony by both Scales and Hewgley. The transaction occurred after Hewgley had operated the mill at a loss for several years, and Scales promptly reduced the operation to little more than a warehouse plus a private fee-grinding facility serving the cattle farms of himself and close associates. The plant was a special-purpose plant that could not easily be converted to other uses. The consideration as disclosed, with the outstanding mortgage indebtedness, implied a valuation of no more than $70,000.00 or $80,000.00 for the mill and the valuable industrial tract with long rail and highway frontages and it may well have been much less. The outstanding insurance on the buildings and equipment totaled $56,000.00. The valuations of the machinery, without considering any discount for transportation to a market, plus the replacement cost of the buildings exceeded this amount. The situation was clearly one in which arson could have been profitable'' (213 F. Supp., page 688).

The common experience is that men burn buildings to collect the insurance when they are **overinsured**, not when they are **underinsured.**

5. The court's Memorandum shows that he acted under the compulsion of a mistake of law since he stated:

> ''Even if the arson issue had to be decided only on the basis of Jones' testimony in court and Nelson's established out-of-court statements versus the plaintiff's rebuttal witnesses, a jury verdict for the defendants would have been fully supported."
>
> **213 F. Supp., page 692.**

Inasmuch as James Nelson on the witness stand testified that he did not burn the mill and the court elsewhere in his Memorandum found that Jones was impeached, saying:

"Jones, of course, was seriously discredited by the nature of his own testimony, and by his admitted hostility to Mrs. Trice, and by the obviously good reasons he had for that hostility. Nevertheless, the implication of his testimony in the context of this case is that such lying as he may have been doing was designed to minimize his admission of complicity in arson rather than to assume a criminal accomplice's role which he did not play, and that his hostility to Mrs. Trice brought out partial truth, not fabrication."

Although the lower court said that the verdict of the jury was contrary to the great preponderance of the evidence, it is not necessary for this Court to read the record and weigh the evidence independently to perceive that "out-of-court" statements of Nelson contrary to his testimony in court together with the testimony of such a man as R. C. Jones, even with all the circumstances enumerated in the Memorandum, could not constitute a great preponderance of the evidence as against the testimony of plaintiff's rebuttal witnesses.

6. The court lacked the power and jurisdiction to make the finding that appellant's counsel was guilty of giving perjured testimony, no particulars of this ground of the motion for the new trial having been set out in the motion filed within 10 days of the entry of the judgment and besides the court invaded the province of the jury whose duty it was to pass on the credibility of the witnesses.

For the above reasons, appellant says that the trial court abused its discretion in granting the alternative motion for a new trial. An authority sustaining appellant's position is the leading case of **Marshall's U. S. Auto Supply, Inc. v. Cashman (C. A. 10th), 111 F. 2d 140**, certiorari denied **311 U. S. 667, 61 S. Ct. 26, 95 L. ed. 426**, where the Court of Appeals for the Tenth Circuit said:

"The fourth and last ground was that the verdict was secured by false testimony offered by the defendant. What testimony? Coming from what source? Given by what witness or witnesses? False in what respect? The motion was completely silent. The evidence presented conflicts, but they were not extraordinary or substantially different from those frequently present in the trial of commonplace cases. Litigation would become interminable if trial courts shall take it upon themselves to set aside every verdict where the evidence is conflicting.

"It is manifest that on clear considerations the motion was inadequate and defective in essential respects and failed to meet recognized requirements for such pleadings. The granting of it exceeded the exercise of sound judicial discretion; it constituted an abuse of discretion.

"Stress is laid upon the point that a new trial was granted on the additional ground that the court was not satisfied with the verdict. But that was wholly ineffective for in that respect the court acted on its own initiative, and Rule 59 (d), supra, limits the time within which a court may order a new trial on its own initiative to ten days from the entry of the judgment. That time has long since expired, and the seasonable serving of the motion did not operate to extend the time within which the court could not act on its own initiative. It follows that at the time the order was entered the court was without power to order a new trial otherwise than on the motion.

"Other questions are discussed but they grow out of the second trial, and the conclusion which we have reached in respect of the action of the court in setting aside the first verdict and allowing a new trial renders it unnecessary to consider them.

"The judgment is reversed with costs, the order setting aside the verdict for defendants and granting

a new trial is vacated, the verdict for defendant is reinstated, and the cause is remanded with directions to enter judgment for defendant on such verdict."

National Farmers Union Auto. & Cas. Co. v. Wood, 207 F. 2d 659 (C. A. 10th), follows the above rule, holding that even though motion for new trial is lodged within 10 days after entry of judgment, granting of new trial on ground not mentioned in motion is to be treated as action by court on its own initiative.

It is the contention of the plaintiff that the trial court was without power or jurisdiction in the case at bar to grant a new trial because it disapproved the jury's verdict or upon the ground stated in No. 14 of defendant's motion, viz., "The competent and credible evidence showed that Joe W. Scales procured the burning of the Pulaski Mill and Elevator Company property," etc.

REASONS RELIED ON FOR GRANTING THE WRIT.

Petitioner says that the Court of Appeals by its affirmance of the judgment of the District Court setting aside the jury verdict and granting a new trial to the defendants after final judgment had been entered in favor of petitioner on the jury verdict and adding interest to which petitioner was entitled as a matter of law rendered a decision that is in conflict with:

(a) Applicable decisions of this Court;

(b) That it has decided an important question arising under the Rules of Civil Procedure adopted by this Court to govern the practice in the district courts which has not been, but should be, settled by this Court; and

(c) That it has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

PRAYER.

Wherefore, petitioner, prays that a writ of certiorari issue from this Honorable Court; and that the judgment of the Court of Appeals be reversed insofar as it affirms the judgment of the district court setting aside the jury verdict and granting a new trial to the defendants, or in the alternative that the Court of Appeals be directed, on remand of the case, to pass on the questions raised by petitioner concerning the judgment of the district court in setting aside the jury verdict and awarding the defendants a new trial and the questions raised by petitioner on her first appeal from the July 23, 1962 order giving the defendants a credit on the judgment on the jury verdict for the amount paid to the mortgagees.

This December 14, 1964.

.....

FYKE FARMER,
1111 American Trust Building,
Nashville, Tennessee 37201,
Attorney for Petitioner.

APPENDIX.

Nos. 15285-86 and 15345.

United States Court of Appeals
For the Sixth Circuit.

Helen Corrinne Scales Trice, Executrix,
Plaintiff-Appellant,
v.
Commercial Union Assurance Company, Ltd., et al.,
Respondents-Appellees.

Appeal from the District Court of the United States for the Middle District of Tennessee.

Decided July 14, 1964.

Before: O'Sullivan, Circuit Judge, and Boyd and Wilson, District Judges.

Wilson, District Judge. These three consolidated appeals involve in single lawsuit brought to collect fire insurance upon a feed mill known as the Pulaski Mill & Elevator Company. The mill was damaged by fire upon July 14, 1956. Joe W. Scales, the original plaintiff, was the owner of the Pulaski Mill & Elevator Company property and was the named insured upon policies issued by the seven insurance companies who are defendants herein.[1]

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[1] The seven defendants who are appellees here are Commercial Union Assurance Company, Ltd., American National Fire Insurance Company, North British & Mercantile Insurance Company, Ltd., New Hampshire Fire Insurance Company, Citizens Insurance Company of New Jersey, Queen Insurance Company of America, and The Home Insurance Company. The case was tried and submitted jointly as to these seven defendants.

The subject insurance policies provided a total coverage of $25,000.00 upon the building and an additional coverage of $25,000.00 upon the machinery and equipment.

At the time of the fire loss, Thurman Smith and the Union Bank of Pulaski, Tennessee, were the holders of an indebtedness approximating $40,000.00, which was secured by a trust deed upon the mill property, machinery and equipment. These lien-holders joined as original co-plaintiffs in the suit, asserting rights under the standard mortgage clauses in the subject policies. In addition to the seven insurance company defendants involved in this appeal, the original suit by the plaintiff, Joe W. Scales, joined two other insurance carriers, seeking recovery for the loss of grain alleged to have been stored in the mill at the time of the fire. The plaintiff, Joe W. Scales, died during the pendency of the suit, and the suit was revived in the name of his executrix, Helen Corinne Scales Trice, who is the appellant herein.

Among other matters asserted in defense of the suit, the defendants below contended that Scales had been guilty of procuring the burning of the said mill and had been guilty of fraud, false swearing and wilful misrepresentation in submitting a proof of loss on the fire in which it is contended he misrepresented the size of the grain storage bins and the quantity of grain lost in the fire. Each side sought to recover of the other a statutory penalty for the other having allegedly exercised bad faith in the bringing of the suit or in the defending of the suit (56-1105 & 56-1106 T. C. A.). The case was tried before a jury. Shortly before completion of the trial and submission of the case to the jury, a settlement was effected between the mortgagee plaintiffs and the seven defendants, in which settlement a total of $32,962.50 was paid to the mortgagees under the building coverage and machine coverage policies, representing a payment on principal of $25,000.00 and a payment on interest of $7,962.50.

A judgment of dismissal was thereafter entered as to the mortgagees' lawsuit. The plaintiff, Helen Corinne Scales Trice, was not in any way a party to the settlement between the defendants and the mortgage holders, and the trial of her case was continued with the case being submitted to the jury upon special issues. The jury found that Scales had practiced fraud in the proof of loss submitted with reference to the grain and contents policies, but had not procured the burning of the feed mill property and had not been guilty of fraud with reference to the building policies or the machinery and equipment policies. The jury further found that Scales had acted in bad faith in bringing the lawsuit against the two defendants upon the grain and contents policies, and awarded these defendants a judgment of $3,000.00. The jury further found that the plaintiff was entitled to recover of the remaining seven defendants the sum of $25,000.00, the policy limits, upon the building policies and $20,000.00 upon the machinery and equipment policies, wherein the policy limits totalled $25,000.00. The claim of the plaintiff for a statutory penalty by reason of bad faith refusal of the defendants to pay the plaintiff's insurance claims was denied by the jury.

The above jury verdict was returned upon May 18, 1962, and upon May 25, 1962, the clerk entered a judgment thereon, awarding a judgment in favor of the plaintiff, Mrs. Trice, and against the seven defendants who were the building and equipment insurance carriers in the sum of $25,000.00 for damages to the insured building and for $20,000.00 for damages to the insured machinery and equipment, and awarding a judgment in favor of the two defendants who were grain insurance carriers and against the plaintiff, Mrs. Trice, in the sum of $2,000.00.

As noted above, a judgment of dismissal was entered as to the claims of the mortgagee plaintiffs upon an agreed settlement, this judgment of dismissal being entered

under date of May 28, 1962. The plaintiff, Mrs. Trice, so the record reflects, has paid the $3,000.00 judgment in favor of the two grain insurance carriers, so that this suit remains pending only as between the plaintiff, Mrs. Trice, and the seven defendants who have the building and equipment coverage.

The issues raised upon these three appeals involve not only matters that transpired at the trial of the case prior to the entry of the judgment upon May 25, 1962, but also matters that arose in subsequent proceedings before the trial court. It is therefore necessary to recount the events in the record subsequent to the entry of the judgment upon May 25, 1962.

Upon May 28, 1962, a motion for judgment notwithstanding the verdict or in the alternate for a new trial was filed upon behalf of the seven defendants involved in this appeal. Upon June 4, 1962, a motion was filed by the plaintiff seeking to have the judgment amended to include interest from the date this suit was filed. Upon July 23, 1962, the Court entered an order amending the judgment of May 25, 1962, so as to allow the plaintiff interest from the date of the filing of the suit, but also allowed the defendants credit for payments made to the mortgagees to the extent the mortgage lien was reduced thereby. Within ten days after the order of July 23, 1962, the defendants renewed their motion for judgment notwithstanding the verdict and for new trial. Each party also filed motions with respect to the order of July 23, 1962, and upon October 8, 1962, the Court overruled the plaintiff's motion to vacate that portion of the order crediting the defendants with the sums paid the mortgagees and overruled the defendants' motions to disallow interest on the judgment, but expressly reserved any action upon the defendants' motions for judgment notwithstanding the verdict or new trial. The plaintiff then on November 7, 1962, filed notice of appeal from those

portions of the order of July 23, 1962, and October 8, 1962, allowing the defendants credit for payments made to the mortgagees. This notice of appeal constitutes the basis of the appeal in Docket No. 15285.

Upon December 20, 1962, the Court entered a further order setting aside the jury verdict upon the grounds that the evidence was undisputed that Scales did practice fraud, false swearing and misrepresentation as against the defendants herein, who were insurors of the buildings and equipment, and upon the further grounds that the verdict was against the weight of the evidence insofar as it found that Scales did not burn his feed mill or cause it to be burned and insofar as it found that Scales did not practice fraud, false swearing and misrepresentation as against the defendants herein. The defendants' motions for a judgment notwithstanding the verdict and for new trial were each thereupon sustained. Action was reserved, however, upon the assessment of damages upon the defendants' counter-claims. A notice of appeal was filed by the plaintiff on January 19, 1963, from the order of December 20, 1962. This notice of appeal constitutes the basis of the appeal in Docket No. 15286.

Upon January 25, 1963, the Court entered a further order disposing of all pending matters, including an affidavit of bias filed by the plaintiff and including the counter-claim based upon alleged bad faith bringing of the suit by the plaintiff. The Court allowed the defendants a judgment of $6,250.00 against the plaintiff upon this counter-claim. A third notice of appeal, which constitutes the appeal in Docket No. 15345, was thereupon filed by the plaintiff, appealing from the order of January 25, 1963. The opinion of the Court upon which the foregoing orders were entered appears under the style of **Smith v. Insurance Co. of North America**, 213 F. Supp. 675.

It is apparent from the foregoing statement of the record that the appeals taken November 7, 1962, and

January 19, 1963, in Dockets Nos. 15285 and 15286 respectively, were prematurely taken in that the orders from which they were taken were not final judgments subject to appeal under 28 U. S. C. 1291. The alternate motions for judgment notwithstanding the verdict or for new trial filed May 28, 1962, remained pending at the time the notice of appeal was filed in both Dockets Nos. 15285 and 15286 and the motions were not finally disposed of until the order of the Court entered January 25, 1963. These appeals should therefore be dismissed. The filing and pendency of these untimely appeals did not divest the Trial Court of jurisdiction to proceed to a final judgment. **United States v. Crescent Amusement Co.**, 323 U. S. 173, 65 S. Ct. 254, 89 L. Ed. 160 (1944); **Healy v. Pennsylvania R. Co.**, 181 F. 2d 934, cert. den. 340 U. S. 935, 71 S. Ct. 490, 95 L. Ed. 674 (C. C. A. 3, 1950); **Resnik v. LaPaz Guest Ranch**, 289 F. 2d 814 (C. C. A. 9, 1961). Furthermore, all issues raised by the appeals in Dockets Nos. 15285 and 15286 are likewise asserted in Docket No. 15345, which appeal the Court will now proceed to consider.

The appellant (the plaintiff below) contends that the Trial Court was in error (a) in granting the judgment notwithstanding the verdict, (b) in granting the motion for new trial, (c) in awarding damages against the plaintiff for a statutory bad faith penalty without submitting this issue to the jury, and after such claim was barred by the statute of limitations applicable to claims against estates, and (d) in ruling upon the defendants' motion for judgment notwithstanding the verdict and new trial after the filing of an affidavit of bias by the plaintiff.

In granting the defendants' motion for judgment notwithstanding the verdict, the Trial Court concluded that the evidence was undisputed that Joe W. Scales, the insured, in his sworn proof of loss had overstated the size of the grain bins and the amount of grain claimed to have been lost in the fire. The Trial Court further concluded

that Scales had made these false representations "knowing either that they were not true or that he did not know they were true," and was thus guilty of fraud, false swearing and willful misrepresentation as a matter of law, thereby entitling the defendants to a judgment notwithstanding the verdict.

A review of the record in this case reveals that it is undisputed in the record that an error or misstatement was made in the proof of loss with respect to the dimensions of certain of the grain storage bins. The proof of loss stated that certain bins involved in the fire had overall dimensions of 20′ x 52′ x 30′, when in fact the bins measured 16′ x 30′ x 17.5′. To constitute false swearing and willful misrepresentation so as to bar the plaintiff's recovery as a matter of law, however, it must appear undisputed that misstatements in the proof of loss were knowingly made with the intent to deceive or defraud the insuror. The knowledge or lack of knowledge as well as the intention or lack of intention upon the part of Scales can only be inferred from all of the circumstances under the record in this case. Scales had died prior to the trial. His statement, taken by the defendants prior to the institution of the lawsuit, was introduced at the trial by stipulation. However, only portions of it appear to have ever been read to the jury. No awareness upon the part of Scales of any error, much less any admission of willful misrepresentation, is made in this statement. In our opinion the issue of the knowledge or intention of Scales was a disputed issue of fact which required submission of that issue to the jury. The intent with which a false representation is made and the existence of fraud is ordinarily a question of fact to be decided by the jury in view of all of the circumstances. **Rooks v. American Brass Co.**, 263 F. 2d 166 (C. C. A. 6, 1959); **Arkansas Fuel Oil Co. v. Magrath Oil Co.**, 131 F. 2d 318 (C. C. A. 6, 1942); **Simon v. Goodyear Metallic Rubber Shoe Co.**, 105 F. 573 (C. C. A. 6, 1900); 24 **Am. Jur.**, Fraud and Deceit, Sec. 295. The

Trial Court was therefore in error in granting the judgment notwithstanding the verdict upon the issue of fraud, false swearing and willful misrepresentation.

Upon the defendants' alternate motion for new trial, the Trial Court concluded that the verdict of the jury was against the great weight of the evidence both upon the issue of fraud and upon the issue of arson and therefore granted the defendants' motion for a new trial. The action of the Trial Court in ruling upon the motion for new trial after having sustained the judgment notwithstanding the verdict was in accordance with the rule in the case of **Montgomery Ward & Co. v. Duncan,** 311 U. S. 243, 85 L. Ed. 147, 61 S. Ct. 189 (1940). The plaintiff contends that the Trial Court was in error in granting the motion for new trial.

The granting of a new trial upon the ground that the verdict is contrary to the weight of the evidence is a matter resting in the sound discretion of the Trial Judge and his action thereon is not reviewable upon appeal except upon a showing of a clear abuse of discretion. As was stated by this Court in the case of **Turner v. United States,** 229 F. 2d 944 (C. C. A. 6, 1956), at page 945:

> "The controlling question is whether the order of the District Court granting a new trial constituted a clear abuse of discretion. (Citations omitted.) It was held in the **Spero-Nelson** case (**Spero-Nelson v. Brown,** 175 F. 2d 86) that where the jury's verdict resolves a factual question the trial court's action in overruling such motion cannot be reviewed by the Court of Appeals unless it involves an abuse of discretion. The granting or refusing of a new trial is a matter resting in the sound discretion of the trial judge and his action thereon is not reviewable upon appeal save the most exceptional circumstances. **Aetna Casualty & Surety Co. v. Yeatts,** 4 Cir., 122 F. 2d 350, 352-354. We therefore are concerned only as to whether the

> District Court clearly abused its discretion in granting the new trial. Cf. **Hill v. Pennsylvania Greyhound Lines, Inc.**, 3 Cir., 174 F. 2d 171, 172. An appellate court reviewing an order granting a new trial will consider all intendments in favor of the order made by the trial judge. The order will not be reversed if the record discloses any tenable ground in support of the order. (Citation omitted.)"

A review of the record in this case reveals that there was no abuse of discretion by the Trial Court in granting the defendants' motion for a new trial. There was substantial evidence in the record to the effect that the insured had been guilty of fraud and false swearing in the proof of loss and that he had participated in procuring of the burning of the subject property.

Having concluded that the judgment notwithstanding the verdict should be set aside but that the Trial Court did not abuse its discretion in granting a new trial, it is not necessary to consider other issues raised in this appeal. The action of the Trial Court in granting the judgment notwithstanding the verdict will be reversed but the order granting a new trial will be affirmed and the case remanded accordingly.